

AMERICAN INTERVENTION IN CUBA AND THE RULE OF LAW

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*With regard to human affairs—not to laugh, not to cry,
not to become indignant, but to understand.*

BENEDICT DE SPINOZA

I. THE COLD WAR AND THE RULE OF LAW

The United States sponsorship of the unsuccessful rebel invasion of Cuba in April 1961 has temporarily climaxed the steady deterioration of Cuban-American relations that has taken place since the advent of Castro on January 1, 1959. This article makes a provisional interpretation of these events, emphasizing their significance for the future role of law in the resolution of disputes between nations in the Western Hemisphere.

It may be useful to suggest the broader relevance of the rebel invasions as an introduction to what intends to be primarily a case study. It is basic, for instance, to understand the extent to which the Cold War influences the formation of national policy in a situation in which our leaders regard political considerations as conflicting with legal commitments.

It is quite evident that United States hostility to Castro was premised upon the assumption that Cuba had become, for practical purposes, a Communist nation closely allied with the Soviet power bloc. As such, Cuba had switched sides in the Cold War¹ and had established in the hemisphere a Communist beachhead of enormous psychological, if not political, potency.² This was regarded as endangering hemispheric solidarity and stability, as well as opening the way for Communist expansion in Latin America. Does the pressure of the Cold War make it legitimate for the United States to act without legal restraint in relation to Castro's Cuba? This somewhat overstates the critical issue raised, it seems to me, by American interventionary conduct in the internal affairs of Cuba. It points, however, to the dilemma created for American policy-makers.

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¹ Schwarzenberger, "Hegemonial Intervention," 18 YB World Affairs 236, 261-263 (1959).

² See e.g., Mills, Listen Yankee, 179-182, 187-189 (1960); Fitzgibbon, "The Revolution Next Door: Cuba," 334 Annals 113, 120-121 (1961); Berle, "The Cuban Crisis," 39 Foreign Aff. 40 (1960); Wymberley, "Forces of Change in Latin America," 44 Dep't. State Bull. 251, 253 (1961); Huberman and Sweezy, Cuba, Anatomy of a Revolution, 145-157 (1961); Draper, "Cubans and Americans," 94 Encounter 59 (1961).

For the urgency of the Cold War must be balanced against the advocacy by the United States of the rule of law in world affairs.³ Senator Warren Magnuson expressed our national sense of mission when he said that "I have long felt that the United States . . . should stimulate among all nations a dependence upon the rule of law in international dealings."⁴ And almost without exception our national leaders have urged that law represents the one alternative to force in international relations.⁵ For example, in 1947 Senator Robert Taft observed that, "I do not see how we can hope to secure permanent peace in the world except by establishing law between nations and equal justice under law."⁶ And former President Eisenhower in an important address on the rule of law given in 1959 at New Delhi suggested that, " . . . the time has come for mankind to make the rule of law in international affairs as normal as it is now in domestic affairs."⁷ There is a widespread awareness that international uses of force gravely heighten the risks of nuclear catastrophe. This awareness gives sentiments expressing a plea for adherence to law in world affairs a relevance to the politics of survival and national interest that was not present earlier in our history.⁸ The rule of law in world affairs has today become a serious objective of "practical men." The Cuban crisis arose from a situation in which the demands of the Cold War were perceived as conflicting with conduct in accord with the rule of law. The United States, it would seem, resorted to indirect intervention which was explicitly prohibited by several applicable treaties.⁹ The strategy of fighting the Cold War was accorded precedence over legal obligations by leading American policy-makers in both major political parties. Such a course of national action is part of a more general trend away from a law-oriented approach to international affairs by the United States when Cold War issues are presented. Notable examples are provided by the overthrow of the allegedly

³ Two interesting recent statements are found in Bishop, "The International Rule of Law," 59 Mich. L. Rev. 553 (1961) and in Douglas, "The Rule of Law in World Affairs" (1961).

⁴ Quoted in ABA, Special Committee on World Peace Through Law, *Compilation of Quotations* 11 (Jan. 1960).

⁵ For representative examples see *Compilation, op. cit.*, note 4.

⁶ *Id.* at 11.

⁷ Eisenhower, *Peace with Justice*, 193 (1961).

⁸ This point is the central point of a paper presented at September 1961 Annual Meeting of the American Political Science Association: Falk, *Impacts of Revolutionary Nations Upon the Growth of International Law*. See also, Jessup, *The Use of International Law*, 8-29 (1959); Brown & Real, *Community of Fear* (1960); Millis, *A World Without War* (1961); Millis, *Permanent Peace* (1961).

⁹ See *infra*, Section IV, pp. 37-65, for a detailed argument in support of this conclusion.

pro-Communist Arbenz government in Guatemala in 1954¹⁰ and the U-2 incident in 1960.¹¹ Additional conduct by the United States indicates a reluctance to implement our frequent pledges to promote the growth of world law: retention of the Connally Amendment, a *political* approach to the recognition of new governments (e.g. Peking China),¹² and an unwillingness to seek legal standards in advance of behavior in connection with the use of espionage satellites in outer space.¹³ This national trend is alarming in view of the choice that exists between force and law in the conduct of foreign affairs. The Cuban dispute imposed upon our leaders the burden of choosing between legal norms and the apparent promotion of the American position in the Cold War. It is possible, in view of the political failure of the interventionary tactics, that strict compliance with law might have maximized the United States' position in the Cold War; nonintervention in other words, might have been the most effective way to cut our losses in Latin America as a consequence of Castro's defection from the West.

The following factors then, seem central to an understanding of the official United States response to Castro: the use of force is the alternative to the rule of law; the use of force increases the risk of nuclear war; legal restraint paralyzes the United States in its effort to wage the Cold War; national leaders seem influenced more by Cold War considerations than they do the struggle to extend the rule of law.

Part of the purpose of this essay is to show that this is a very dangerous and unnecessary way to comprehend most contemporary international situations. It is essential that we as a nation discover the *practical* value of legal self-restraint and that we find lawful ways to promote our political interests. For instance, it is essential that we help, rather than hinder, social revolutions in Latin America so that radical elites will not be led to the Soviet bloc as the only available source of support; specifically, Castro *might* have been allowed to develop his internal social program in such a way that Cuba would not have been led to identify with the communist cause in world affairs, and this might have avoided the pressures that led the United States to follow a course of dubious legality. A clear distinction be-

¹⁰ See Graber, *Crisis Diplomacy* 243-245 (1959) [hereinafter cited as GRABER]; Thomas and Thomas, *Non-Intervention* 297-299 (1956) [hereinafter cited as THOMAS]; Falk, "The United States and the Doctrine of Non-intervention in the Internal Affairs of Independent States," 5 *How. L. J.* 163, 181-183 (1959).

¹¹ Wright, "Legal Aspects of the U-2 Incident," 54 *Am. J. Int'l L.* 836 (1960).

¹² Cf., H. Lauterpacht, *Recognition in International Law* (1947).

¹³ See report of U.S. position on Samos (espionage satellite) in *N.Y. Times*, Oct. 11, 1960, p. 12, col. 1.

tween socialism and communism might help us to make a more rational balance between the Cold War and the rule of law.¹⁴

The use of supranational institutions is expected to exert control upon the conduct of states in the world. However, a further negative lesson of the Cuban experience is the marginal importance of the Organization of American States to the United States policy of keeping communist elites from gaining control of governments in the hemisphere. Although all Latin American countries are willing to condemn the international communist movement as interventionary when it extends its activities to the Western Hemisphere, the stronger OAS nations of South America are unwilling to take collective action to overthrow such a government by coercion. This unwillingness was expressed first at Caracas in relation to Guatemala, and more significantly, throughout the Cuban crisis. The South American states are more concerned with defending the concept of nonintervention than with acting jointly to root out communist control. The United States is strongly disposed to view the need to act against the communist menace as more pressing than to guard states against intervention. In fact, the United States has consistently urged at OAS meetings that collective responsibility was a necessary complement to the renunciation of unilateral intervention as it had been practiced by the United States during the latter decades of diplomacy under the Monroe Doctrine.¹⁵ One way, then, to view the Cuban crisis is to regard it as the American reaction to the failure of the OAS to carry out its duties of collective action. Such thinking appears to have been dominant in President Kennedy's mind when he said in an important address to the American Society of Newspaper Editors:

... [L]et the record show that our restraint is not inexhaustible. Should it ever appear that the inter-American doctrine of non-interference merely conceals or excuses a policy of nonaction—if the nations of this hemisphere should fail to meet their commitments against outside Communist penetration—then I want it clearly understood that this Government will not hesitate in meeting its primary obligations, which are to the security of our Nation.¹⁶

¹⁴ That is, a program of radical social change in the direction of "socialism" should not necessarily threaten the United States' position in the Cold War. This is illustrated by the political affiliations of such "socialist" nations as Israel, Uruguay, and Yugoslavia. In fact, it is felt, that socialism is a stabilizing, Communist-resisting tendency in the newly developing parts of the world, and should therefore be actively encouraged by the United States.

¹⁵ Miller, "Nonintervention and Collective Responsibility in the Americas," 22 Dep't. of State Bull. 768 (1950).

• ¹⁶ Kennedy, "The Lesson of Cuba," 44 Dep't. State Bull. 659 (1961).

The significance of this assertion of policy by our President can hardly be stressed enough. It makes a residual claim to act unilaterally in the event that the OAS fails to act collectively. It remains to be seen what the future will hold for this new expression of American foreign policy (identified here as "The Kennedy Doctrine") in the Western Hemisphere.¹⁷ It is evident that the United States does not feel that its national interests in the Cold War are currently protected by the collective machinery of the OAS. This political conclusion must be considered in light of the American legal pledge to use the OAS in the event that coercive action is needed to overcome communist control in a Latin American country. This represents, then, a second dimension of the perception by American leaders of the conflict between legal and political considerations in the Cold War.

The instability created by the Cuban events is further revealed by the Soviet response. Premier Khrushchev and the Soviet press emphasized generally the United States role in the violation of Cuban sovereignty that resulted from the interventionary attempt to overthrow Castro. But more significant is the stress upon reciprocity in Premier Khrushchev's Message to President Kennedy on April 22, 1961:

Mr. President, you are taking a very dangerous path. Think about it. You speak about your rights and obligations. Certainly, everyone can have pretensions to these rights or those rights, but then you must also permit other states to base their acts in analogous instances on the same kind of reasons and considerations.¹⁸

If the United States can intervene to counteract the danger of Soviet domination in Cuban affairs, certainly then, the United States is foreclosed from objecting if the Soviet Union intervenes in Turkish or Pakistani affairs to thwart American domination. Khrushchev put it this way:

You declare that Cuba is allegedly able to use its territory for acts against the United States. This is your assumption, and it is not based on any facts. We, however . . . are able now to refer to concrete facts and not to assumptions: In some countries bordering directly on the Soviet Union . . . there are governments which have put their territory at its [the United States] disposal to accommodate American military bases there.

¹⁷ It may not contribute a new operating policy to governmental relations in the hemisphere, especially in view of the Cuban mishap. Thus the Kennedy Doctrine might amount to no more than an *ad hoc* formulation made under the pressure of events. It was part of an address made while the Cuban invasion was still going on.

¹⁸ "Mr. Khrushchev to President Kennedy," (unofficial translation of message date April 22, 1961), reprinted in 44 Dep't. State Bull. 664, 665 (1961).

The conclusion is then deftly drawn:

If you consider yourself to be in the right to implement such measures against Cuba which have been lately taken by the United States of America, you must admit that other countries, also, do not have lesser reason to act in a similar manner in relation to states on whose territories preparations are actually being made which represent a threat against the security of the Soviet Union. If you do not wish to sin against elementary logic, you evidently must admit such a right to other states.¹⁹

I have quoted from Khrushchev's response at this length because it seems to touch so directly upon the role of law in the context of the Cold War—namely, to specify mutual limits upon national behavior so as to prevent outbreaks of international violence. Khrushchev's argument is based upon the idea that minimum world order arises from reciprocal self-restraint on the part of states in the world, and that this order depends upon mutuality of compliance. If one nation exceeds the prevailing limit, then it licenses other nations to do the same thing. This is a distinctive quality of the law-behavior of a decentralized political order in which power is horizontally²⁰ distributed. Contrast the domestic vertical order in which a violation of a legal standard by one citizen leads the state to impose direct, coercive sanctions upon the violator. There is no general notion in domestic society that because others violate the law, say against homicide or rape, I am entitled to do the same; however, a vertical order occasionally behaves like a horizontal order, as when it enacts widely unpopular laws. Reciprocity undermined the usual fidelity of Americans to law during the prohibition era. In contrast, a horizontal order will behave like a vertical legal order if an overwhelming consensus favors the enforcement of a legal rule against a violator; this is one way to examine the effectiveness of the response in the United States to the Suez invasion initiated by France, Great Britain, and Israel in 1956.²¹ Generally, however, the international legal order depends on the horizontal restraints imposed by considerations of reciprocity if it is to be effective.

President Kennedy seemed to hint that the Soviet intervention of 1956 in Hungary was a horizontal precedent for prospective American intervention in Cuba when he said:

Should that time come [for an American intervention] we do not

¹⁹ *Ibid.*

²⁰ Falk, "International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order," 32 *Temp. L.Q.* 295 (1959).

²¹ Falk, "Jurisdiction, Immunities and Act of State: Suggestions for a Modified Approach," *Essays on International Jurisdiction* (1961).

intend to be lectured on "intervention" by those whose character was stamped for all time on the bloody streets of Budapest.²²

This accords with the logic of reciprocity, but it should be noted that the Soviet action in Hungary, bloody as it was, did not involve border-crossing (Soviet forces were lawfully present in Hungary), nor did it involve an effort to overthrow a legitimate and functioning government.

It should be observed, furthermore, that the United Nations did not provide very strong vertical direction in the Cuban crisis. Premier Khrushchev in his April 22nd Message to President Kennedy said:

I wish to stress that if the United Nations is destined to attain true strength and fulfill the functions for which it was created . . . then the United Nations must resolutely condemn the warlike actions against Cuba.²³

Regardless of how one interprets the Cuban invasion, it is clear that a Member of the Organization was subject to an armed attack across its borders, which was facilitated by the willingness of other countries to give their support to enemies of the legitimate government. In the face of such coercive violation of Cuban sovereignty the United Nations did no more than to pass a Seven-Power Resolution that expressed deep concern and "exhorted all Member States to take such peaceful action as is open to them to remove existing tension."²⁴ A somewhat stronger Mexican Draft Resolution which obtained a 41-35 majority, failed of adoption because it did not obtain a necessary two-thirds majority in the General Assembly. It called upon all States "to seek the pacific settlement of disputes" and went on as follows:

1. *Makes an urgent* appeal to all States to ensure that their territories and resources are not used to promote a civil war in Cuba;
2. *Urges* them to put an immediate end to any activity that might result in further bloodshed;
3. *Requests* them to cooperate, in keeping with the spirit of the Charter, in the search for a peaceful solution to the present situation.²⁵

The refusal of many nations to vote for the Mexican Resolution indicates the inadequacy of the protection that will be given to an unpopular small state that is the target of aggression; this further underscores the dependence of nations upon the horizontal controls

²² Kennedy, *op. cit. supra*, note 16, at 659.

²³ Khrushchev, *op. cit. supra*, note 18, at 665.

²⁴ U.N. Doc. A/C.1/L275; adopted in plenary session April 21, 1961 by a vote of 59 (including U.S.) to 13, with 24 abstentions.

²⁵ U.N. Doc. A/C.1/L275; the vote in plenary session was 41 to 35 (including the U.S.), with 20 abstentions; the resolution failed of adoption as it lacked the necessary two-thirds majority.

over force in international relations, especially when border-crossing (as distinct from internal civil strife) is involved.

This general introduction seeks to establish a background apt for an inquiry into the circumstances that led up to, and the legal status and implications of, the rebel invasion of Cuba in April 1961. It seems desirable to begin by a summary depiction of the role of the United States in pre-Castro Cuba. For the post-Castro development cannot be appreciated without some awareness of the historical and socio-economic involvement of the United States in Cuban affairs since the beginning of the nineteenth century.

II. PRE-CASTRO CUBAN-AMERICAN RELATIONS

A. *United States and Colonial Cuba (1498-1898)*

The modern history of Cuba commences with its discovery by Columbus in 1492, and its subsequent colonization by Spain.²⁶ Until the nineteenth century Cuba was valuable to Spain mainly as a strategic naval base. Throughout this period it was a source of concern to the leading maritime powers in the Caribbean as its natural harbors served so well the needs of pirates and corsairs. In addition, periodic raids upon Cuban territory were staged by French, English, and Dutch buccaneers. However, with the exception of a brief period of English occupation in 1762-63, Spanish rule in Cuba was uninterrupted. From the very beginning, the Spanish *conquistadores* cruelly exploited the inhabitants of the island, exterminating many of the native Indians and importing large numbers of slaves. Native resistance was led by an Indian named Hatüey, who when led to the stake by the Spanish, was offered Christian baptism and absolution. He asked, "[a]re there white men in heaven?" When told that there were, Hatüey is reported to have said—"then I do not want to become a Christian, for I would not go to a place where I must find men so cruel."²⁷ Oppression continued to characterize Spanish rule in Cuba until its end in 1898.²⁸

The earliest American interest in Cuba was part of the expansionist spirit that arose in the United States early in the nineteenth century. The primary energy of this drive was devoted to the establishment of a continental republic stretching from ocean to ocean. It was this movement—later colorfully identified as the Manifest Destiny of the

²⁶ My historical survey relied heavily upon Graham H. Stuart's conservative interpretation of the early relations between Cuba and the United States in Stuart, *Latin America and the United States*, 195-223 (4th Ed. 1943) [hereinafter cited as STUART]; Stuart, *Cuba and its International Relations* (1923).

²⁷ As told by Beals, *The Crime of Cuba*, 26 (1933) [hereinafter cited as BEALS].

²⁸ This is developed vividly by BEALS and in Jenks, *Our Cuban Colony* (1928) [hereinafter cited as JENKS].

United States²⁹—that led to the Louisiana Purchase and the annexations of Florida, California, and Texas, but failed in its effort to incorporate Canada. Cuba, considered vital to the protection of Florida and the Gulf coast was a natural object of American ambition. John Quincy Adams, writing as Secretary of State in 1823, formulated the official American expectation as follows:

These islands [Cuba and Puerto Rico] from their local position are natural appendages to the North American continent, and one of them [Cuba] almost in sight of our shores, from a multitude of considerations has become an object of transcendent importance to the commercial and political interests of our Union. . . . [I]n looking forward to the probable course of events for the short period of half a century it is scarcely possible to resist the conviction that the annexation of Cuba to our Federal Republic will be indispensable to the continuance and integrity of the Union itself.³⁰

This expectation of eventual annexation was accompanied by an overriding diplomatic policy designed to avoid the transfer by Spain of its Cuban colony to England or France. The United States did not regard Spain as much of a threat. Spain had suffered a serious decline in power and its colonial administration of Cuba was so inefficient that it did not take advantage of the island's strategic position as a natural center of trade and commerce: but English or French occupancy would have been far more threatening to American development. As early as 1810 President Madison wrote in an official letter that the United States could not be "a satisfied spectator" if Cuba were to fall "under any European government, which might make a fulcrum of that position against the commerce and security of the United States."³¹ The United States, in a manner curiously analogous to its present hemispheric policy, was more disturbed about new extra-hemispheric intrusions by European nations than by an undesirable *status quo* (Spanish rule in Cuba). In 1823 this priority was even made an explicit part of the Monroe Doctrine:

With the existing colonies and dependencies of any European power we have not interfered and shall not interfere.³²

The basic United States position in this early period combined a respectful deference to Spanish claims in Cuba with the conviction that the weak Spanish administration would be overthrown from within, and that an independent Cuba would automatically gravitate towards the United States sphere of influence, perhaps even seeking annexation.

²⁹ See excellent study by Bemis, *Latin American Policy of the U.S.* 47, 73-97 (1943).

³⁰ Moore, *Digest of International Law*, VI, 380 (1906).

³¹ Quoted by Stuart, *Cuba and Its International Relations*, at 17.

³² President Monroe's Seventh Annual Message to Congress, December 2, 1823.

tion. Thus the United States interest in Cuba was adequately protected so long as no third power capable of taking full advantage of Cuba, especially England, succeeded Spain as administrator of Cuba.

However, the inhumanities of Spanish colonial administration, the growing commercial importance of Cuba, and the strong pressure in the South to expand the slave-owning territory of the United States generated increasing pressures to make Cuba part of our country after the annexation of Texas in 1845. Efforts to negotiate the purchase of Cuba from Spain failed, and this induced American expansionists to propose more coercive measures to reach their end. Here again the historical antecedent recalls the contemporary situation. Cuban patriots seeking independence came to the United States to organize an expedition against Cuba. Their leader was a dedicated revolutionary named Narciso López. His cause evoked sympathy, especially in the South, and it was not surprising that his attempt "to recruit an expedition on American soil to free Cuba . . . found much assistance in high quarters."³³ However, after easily collecting "the nucleus of a force," a proclamation in 1849 by President Taylor, "warning all citizens against participation in such enterprises, had a deterrent effect. The two vessels in which the expedition planned to leave New York were seized by the authorities, though the filibusters themselves were not held."³⁴ López, however, was not dissuaded. In 1850 he organized a second expedition which made a landing in Cuba. This attempt also failed when López did not "receive the assistance expected from the natives" and was then "faced with an openly mutinous crew."³⁵ A third López expedition was defeated in 1851. The López expeditions are a curious anticipation of the rebel invasions of 1961, and displayed analogous participation by the United States. Interestingly, the diplomatic competitors of the United States formally disapproved of the American failure to prevent its territory from being used by dissident Cuban exiles to overthrow Spanish rule. A treaty guaranteeing Cuba to Spain was rumored to have been signed in 1851 by Great Britain, France, and Spain, and in 1852 the United States was invited to join England and France in an agreement "disclaiming all intention of obtaining possession of Cuba."³⁶ The United States declined the invitation although it did assure the European nations that it not only had "no design upon Cuba itself, but it was willing to assist Spain in preserving it."³⁷

³³ STUART, 208.

³⁴ *Id.* at 205.

³⁵ *Ibid.*

³⁶ *Id.* at 206.

³⁷ *Ibid.*

United States policy wavered. In 1853, however, President Pierce appointed Pierre Soulé to Spain. Soulé was an avowed supporter of López and revived the idea that the future of Cuba must be assimilated into the Manifest Destiny of the United States, even if this required the use of force. Soulé was instructed to negotiate the purchase of Cuba. The militancy of Soulé's policy was revealed in the "Ostend Manifesto" which entreated Spain to benefit Cuba and herself by selling Cuba to the United States. It added, "[b]ut if Spain, dead to the voice of her own interests, and actuated by stubborn pride and a false sense of honor, should refuse to sell Cuba to the United States . . . then by every law, human and divine, we shall be justified in wresting it from Spain, if we possess the power."³⁸ President Pierce, unwilling to apply such explicit pressure, disavowed the Ostend Manifesto, and Spain ignored it. The slavery issue gradually came to dominate American politics, and the position of the North precluded the incorporation of any additional slave territory into the Union. Cuba did not again figure prominently in American concerns until after the Civil War.

In the closing decades of the century Cuba was in a state of almost continual internal unrest, highlighted by an internal uprising in 1868 that lingered on until its final suppression in 1878. Spanish oppressive rule was slightly liberalized by concessions achieved as a result of these internal rebellions, but the situation remained intolerable. The governmental revenues, gained by burdensome taxes placed on basic items like flour and salt, were used to fill the Madrid treasury and to pay exorbitant salaries to the corrupt and inefficient Spanish colonial elite composed mainly of uneducated, petty bureaucrats. This situation infuriated the cultured upper classes in Cuba, and kept alive the passion for national independence. Reforms were illusory, disease and chaos were rampant, and a new major revolution broke out in 1895 which seems to have received important financial support in the United States.³⁹ The United States took an official position of aloofness, but public opinion ardently supported the Cuban independence movement. American economic interests in Cuba had grown to a point where civil strife was very costly. In addition, the United States appeared eager now to have a war so as to display its military prowess as a great power in the world.⁴⁰ Tension in Spanish-American relations mounted to a climax when the United States warship *Maine* was exploded in the Havana harbor on January 25, 1898. Congress soon passed a joint resolution proclaiming Cuban independence, authorizing President Mc-

³⁸ *Id.* at 208-209.

³⁹ *Id.* at 216.

⁴⁰ See JENKS, 48-57.

Kinley to use the American army and navy to compel the withdrawal of Spanish forces from Cuba, and disclaiming any intention to impose American sovereignty upon Cuba beyond that needed to establish peace and order. Historians feel that the sinking of the *Maine* was a pretext for war rather than a cause of war. As Jenks points out, 1896 was the rational moment to intervene on behalf of the oppressed Cubans or to defend American property from plunder. By 1898 Spain was on its way to reforming the grossest evils of its colonial administration as a result of internal and external pressure. War fever in the United States, then, is viewed as the major explanation for the decision to wage war against Spain in 1898. It was never clear, for instance, that Spain was even responsible for blowing up the *Maine*. War followed, ending quickly in a complete victory for the United States. In the peace treaty signed on December 10, 1898, Spain relinquished all sovereignty over Cuba and agreed to evacuate at once.

This first phase of Cuban history bears significantly upon the current state of Cuban-American relations. First, the nineteenth century revealed an American concern that alternated between a minimum policy of keeping political rivals from taking over Cuba and a maximum policy of annexation. This pattern of alternation between a policy of protection and one of domination has pervaded United States action in Latin American from the beginning. Second, American concern with Cuban welfare was never sufficient to lead us to intervene to establish an independent Cuba or to resist the frightful barbarism of Spanish policy. Such aloofness from domestic welfare foreshadows our policy of tolerance, if not support, until very recent years, of oppressive dictatorships throughout Latin America. Selfish domestic policies—from slavery to sugar—and not altruism or hemispheric solidarity accounted for our conduct towards Cuba. It was only when the failures of Spanish rule led to internal disorders that hurt American private investments in Cuba that we were led to act against Spain, and the final coercive action was not even prompted by such rational considerations as national self-interest. The Spanish-American War resulted more from war fever than anything else.

The dominant United States concern in the nineteenth century was to keep extra-continental political rivals out of Cuba and to protect the interests of American investors within Cuba. Many would say that the twentieth century is heir to the nineteenth.⁴¹ One can interestingly substitute England or France for the Soviet Union, Spanish colonialism for Castroism, and López for Cardona to perceive the sturdy strands of continuity.

⁴¹ This is emphasized by BEALS, JENKS, Huberman and Sweezy, and Mills. For latter two books see citation *supra* note 2.

Contemporary Cuba inherits from colonial Cuba a tradition of authoritarian leadership and internal discontent. Fidel Castro knows how to exercise the leadership by exploiting the discontent. The dramatization of the United States as the demonic enemy of Cuba, however, depends upon developments that took place during the second phase of Cuban history. Even here, however, hatred of the Spaniards was a psychological preparation for hatred of the United States; in each instance it was plausible for national leaders to explain the ills of Cuba by reference to the domineering role of a foreign nation.

B. 1898-1959

The United States occupied Cuba as an administering power after the defeat of Spain in 1898. Despite some internal discontent, American administration was welcomed by the Cubans. It performed beneficently, improving health and sanitation throughout the island, and encouraging the formation of institutions of local government. The colonial legacy of disease, anarchy, and starvation was overcome by the able American Governor-General Leonard Wood.⁴² Having restored order the United States acted to end its military trusteeship of Cuba, thereby honoring its pledge to respect Cuban independence and to refrain from annexation. A Cuban constitutional convention was convened to prepare the island for self-government. However, as is well-known, the United States did compel Cuba to accept, over hostile objection, the humiliating subordination decreed by the Platt Amendment.⁴³ The most controversial provisions restricted Cuba's power to contract foreign debts (Article II), gave to the United States a unilateral right to intervene in the internal affairs of Cuba under broad circumstances (Article III),⁴⁴ bound Cuba not to diminish her sovereignty by treaty with a foreign power nor to permit another nation to exercise military power on the island (Article I), and gave to the United States coaling and naval bases (Guantanamo) (Article VI). Cuba was particularly upset about the interventionary right claimed by the United States. Elihu Root in a dispatch to General Wood tried to relieve the Cuban fears that Article III would deprive them of their

⁴² See able exposition in JENKS, 58-84.

⁴³ Cf. JENKS, 78-84, GRABER, 141-142.

⁴⁴ Article III is so important that its text will be given in full:

The Government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the Treaty of Paris on the United States, now to be assumed and undertaken by the Government of Cuba.

The entire international agreement known as the Platt Amendment may be found in *Treaties and Conventions, 1776-1909*, I, 363-364.

independence by saying that "[i]t does not give the United States any right she does not already possess and she has not exercised." The treaty provision is, however, "of immense value in qualifying the United States to protect the independence of Cuba."⁴⁵ That is, American intervention is legitimated in advance, thereby overcoming the objection of third states to intervention. This was thought especially useful to meet growing criticism in Latin America of protective interventions by the United States in the internal affairs of its hemispheric neighbors during the later applications of the Monroe Doctrine.⁴⁶ The Platt Amendment adds legitimacy to the operative diplomatic policy that arose when the Roosevelt Corollary was added to the Monroe Doctrine.

The United States did intervene with armed force in 1906 to restore internal order after a protracted period of civil strife. American administration lasted until 1909, and on this second occasion was evidently oppressive, corrupt, and partial to American interests.⁴⁷ A brief intervention to protect the sugar crop from destruction during a rebellion in 1917 also took place. And in 1924 and 1934 the United States controlled the outcome of civil strife by supplying arms to the government and placing an embargo on the sale of arms to the insurgents. Beyond the actual resort to intervention, the threat of intervention exercised a potent influence on Cuban internal affairs; it has been observed that "[t]he specter of armed action, which hovered over Cuban-American relations, undoubtedly deserves a large share of the credit for making Cubans tractable."⁴⁸ Resentment against the hegemonial role of the United States increased. American economic domination of Cuba—its sugar industry and its international trade—and the interventionary prerogative claimed under the Platt Amendment were the principal bases of the unpopularity of the United States.⁴⁹ However, as Graber has pointed out, the Platt Amendment did not actually expand the interventionary practices of the United States.⁵⁰ It merely gave a semblance of bilateralism and legality to the interventionary patterns of practice that developed in relation to the later applications of the Monroe Doctrine to protect business interests of American citizens in Latin America, and especially Central America.

⁴⁵ Quoted in JENKS, 81.

⁴⁶ Cf. GRABER, 141: "Judging from the use made of such treaties, they were not intended to convey rights of interference beyond those inherent in the right of intervention."

⁴⁷ See JENKS 87-103.

⁴⁸ GRABER at 145.

⁴⁹ This is the main emphasis in the full-length studies made by Jenks and Huberman and Sweezy.

⁵⁰ Fitzgibbon, *op. cit. supra*, note 2, at 114.

Proximity to the United States accounts for the particularly heavy influence, more than did the Platt Amendment. The lament attributed to the Mexican President Porfirio Diaz, "Poor Mexico—so far from God, so near to the United States," seems equally pertinent to Cuba's situation.

A permanent handicap to the image of the United States in Cuba has resulted from our apparent support of ruthless dictators of the right. American economic interests wanted internal political order and the social *status quo*. For these purposes a dictator was ideal. He could also be persuaded by graft to accord favorable treatment to business interests. Such dictatorships often lack internal popular support, and actually invite external intervention to suppress a popular protest movement. Thus an invitation to intervene by a reactionary dictator, although significant for purposes of legal evaluation, makes an intervention less, rather than more, acceptable. It is in this light that one must understand the hatred of the United States aroused by our support of the reviled Cuban dictator, Machado, from 1925-1931; this man was a bloody tyrant "crushing all his opposition to the extent of imprisoning and assassinating his adversaries."⁵¹ In 1928 the United States sent Harry F. Guggenheim, a prominent Latin American businessman, as our Ambassador to Cuba; ". . . he stood consistently behind President Machado and the maintenance of a strong, stable government."⁵² It was quite literally like supporting Al Capone as the Head of State of a foreign nation, and tolerating his gangster methods.⁵³ Machado was eventually overthrown because a drop in the world sugar price threatened the Cuban government with bankruptcy.⁵⁴ The interweaving of the fortunes of the sugar industry and political change tell an interesting part of the Cuban story.⁵⁵

In 1934, fearing a failure to maintain stability, the United States withheld recognition from Grau San Martín who was the first reformist figure to emerge as a Cuban leader. Our opposition to this liberal president led to the downfall of his government, and its replacement in 1934 by a dictatorship in which Batista was the decisive force. The United States thus gave its powerful backing to repressive dictatorships, opposed reformist elements, and proclaimed at Pan American Congresses its commitment to the principles of liberal democracy. The gap between the word and the deed exacerbated the wound caused by

⁵¹ STUART at 238.

⁵² *Ibid.*

⁵³ STUART, 237-241; BEALS, 235-399.

⁵⁴ STUART, 238-239.

⁵⁵ See especially books by Jenks and Huberman and Sweezy for comprehensive account.

our support of reactionary governments that left the mass of Cubans in a condition of grave poverty, disease, and illiteracy.

As is well known President Franklin Roosevelt was eager to improve American relations with Latin America. He acknowledged the widespread opposition aroused by interventionary practices and claims. Thus the United States was led to renounce its interventionary privilege, whether based on the unilateralism of the Monroe Doctrine or the spurious bilateralism of the Platt Amendment.⁵⁶ Thus the United States followed its general nonintervention pledge of 1933 with a formal renunciation in 1934 of the right of Cuban intervention that had been conferred by the Platt Amendment. However, the United States continued to dominate Cuban affairs by exerting economic and psychological pressure. A recent commentator suggests the term "Plattism" to describe this less structured hegemony that characterized the role of the United States in Cuban affairs until the fall of Batista in 1959.⁵⁷ This American role was perceived hostilely by Cubans concerned with the achievement of internal social and economic progress. As such, it must be regarded as a significant part of the background favorable to the emergence of Fidel Castro.

This survey of Cuban-American relations contains many gross simplifications. However, it is intended to help one to understand the general character of Castroism and, especially, the use by Castro of anti-American sentiment to mobilize public opinion. Castro has brought to Cuba its first program of radical social change. He responds thus to the need to overcome the pitiful state of the impoverished masses, especially those living in rural Cuba.⁵⁸ His economic measures of land reform and nationalization must be viewed against this background of inequality and foreign domination. His political hostility to our country must be understood in the light of sixty years of humiliating Cuban subordination to the United States, especially drawing sustenance from our role in keeping men like Machado and Batista in power.

The early colonial history of Cuba suggests the deep roots of authoritarian political rule and foreign economic exploitation in Cuban tradition. It reveals, also, our expansionist interest in Cuba and our unwillingness to act against Spain to achieve Cuban national independence until we were ready for selfish purposes to fight the Spanish-American War in 1898. The settlement of that war led to a prolonged American military occupation and a formalized acceptance of United States hegemony in the Platt Amendment.

⁵⁶ The full development is outlined further in this manuscript.

⁵⁷ Fitzgibbon, *op. cit. supra*, note 2, at 114.

⁵⁸ Huberman and Sweezy; *op. cit. supra*, note 2, at 1-10; Nelson, *Rural Cuba* (1950).

From the Civil War onwards the United States exercised an important role in the economic life of the island. The crippling dependence of Cuba upon her sugar industry⁵⁹ gave the United States, as dominant consumer, an enormous control lever over Cuban affairs. In addition, quota preferences and subsidies to the sugar trade helped the Americans who owned the large plantations to earn huge profits, but did not filter significantly downwards to help raise the standard of living of the average Cuban. Thus American generosity to Cuba in trade relations was usually beneficial only to a small economic elite, composed largely of Americans and a few wealthy Cuban families.

Such a negative characterization of the American role in Cuba is not the full story, but it does account for the way in which we are perceived by reformist and radical Cuban social and political groups. It would be easy to show, for instance, that without the participation of the United States in pre-Castro times Cuba would have been in an even worse condition with greater socio-economic disparities a less developed economy, and a political atmosphere alternating between bloody strife and bloody tyranny.

III. INTERVENTIONS AND PROVOCATIONS 1959-1961

A factual account of the deterioration of United States relations with Cuba between the period of January 1, 1959 and April 17, 1961 is enormously complex⁶⁰ and inessential to the purposes of this article. Some of the implications of this deterioration will be suggested in a concluding assessment. Three interventionary measures by the United States seems central to the task of legal evaluation:

(1) The elimination by the United States on July 6, 1960, of the import quota assigned to Cuban sugar at guaranteed prices; the dependence of internal Cuba upon revenue and foreign exchange from sales of sugar to the United States gave to this conduct a highly coercive tendency designed to impose the will of the United States upon Cuban internal affairs. Such an effort to bring Cuba to its knees will be characterized for purposes of later discussion as "indirect economic intervention."

⁵⁹ Persuasively described with supporting statistics *id.* at 11-22; see full account in JENKS.

⁶⁰ It can be traced by use of the N.Y. Times for the period; for a convenient summary of the highlights up to November 1960 see Cuba and the United States (ed. by A. G. Mezerik) (1960); a full account of the U.S. position is given by the Department of State in its "white paper" released on April 3, 1961: Cuba, Dep't. of State publication 7171 (1961). An excellent analysis of the significance of this period can be found in Blanksten, "Fidel Castro and Latin America" (paper prepared for delivery at 1961 Annual Meeting of the American Political Science Association); see also Draper, "Castro's Cuba," 90 Encounter 6 (1961).

(2) On October 19, 1960, the United States placed an embargo on all exports to Cuba "except for non-subsidized foodstuffs, machines, and medical supplies;"⁶¹ such an embargo was an explicit retaliation for Cuban confiscation of American property in Cuba and alleged fiscal discrimination against American products and business; however, such pressure brought to bear by a relatively more powerful state upon a weak state seems also to constitute "indirect, economic intervention."

(3) The United States used its facilities and its territory to train, advise, finance, equip, and transport the Cuban rebels who took part in the anti-Castro invasion of April 1961; as was observed a week after the invasion: "The government [of the United States] no longer denies that the CIA, acting upon Presidential authority, did organize and direct last week's attempted invasion of Cuba."⁶² Such sponsorship of an armed attack upon a nation with which we are at peace can be regarded either as an "act of aggression" or as "indirect armed intervention."

These three interventionary efforts by the United States sufficiently depict the background facts to enable a discussion of the legal doctrine of nonintervention.

The legal status of these interventions must not be viewed in isolation. It is crucial to have an awareness of the character of provocations that led the United States to pursue an interventionary course in conflict with its legal commitment to nonintervention. In fact, the apparent absence of United States alternatives to intervention is part of the reason why it is so important to attain a calm understanding of these events. To do this, however, one must realize that a provocation short of an armed attack, entitling a state to have recourse to self-defense, is *irrelevant* to an appraisal of the illegality of interventionary conduct.⁶³ Having said this, let me enumerate now the provocations or alleged provocations⁶⁴ that led us to seek an illegal interventionary solution to our difficulties with Cuba:⁶⁵

⁶¹ For text of U.S. announcement of the embargo see N.Y. Times, October 20, 1961, p. 8.

⁶² Rovere, Letter From Washington, New Yorker, May 6, 1961, p. 139.

⁶³ The phrasing of Article 51 of the United Nations Charter appears unambiguous on this point. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense *if an armed attack occurs against a Member of the United Nations*. . . ." (emphasis added); *but see*, Stone, Aggression and World Order (1958).

⁶⁴ The concept of "alleged provocation" intends to highlight the absence of convincing evidence that the Soviet Union has intervened in Cuban internal affairs or that Cuba has aligned itself with the Soviet bloc or even that the Cuban government is presently Communist-controlled.

⁶⁵ See State Department white paper Cuba, *op. cit. supra*, note 60; Berle, *op. cit. supra*, note 2.

- (1) Extra-hemispheric interference in Cuban affairs by members of the Sino-Soviet bloc;
- (2) Characterization of the Castro government as subject to the control of the international communist movement;
- (3) Anti-American animus of Castro's leadership, arousing hostility and hatred;
- (4) Castro's internal totalitarianism which was said to betray the liberal democratic ideals of the revolution as he had proclaimed them in the 1957 Declaration from Sierra Maestra;
- (5) Confiscation of property owned by American nationals and discriminatory enforcement of taxing laws and foreign exchange regulations;
- (6) Refusal by Castro to seek peaceful settlement of differences with the United States through mediation of the OAS;⁶⁶
- (7) Generation of subversion and intervention throughout Latin America by efforts of Castro to export his brand of revolution;
- (8) Refusal of the OAS to take collective action of an effective variety against Castro;
- (9) Fear that the success of Castro in Cuba would lead to new Castros throughout Latin America, thereby imperiling hemispheric solidarity as well as the private investments of United States citizens.

Thus we are ready to proceed with a discussion of the relevant legal norms. One question should be kept in mind. It is posed by the pressure exerted by the intense provocations upon the absolute commitment to refrain from intervention. It is underscored when the target of intervention is a recalcitrant debtor state that has violated legal obligations designed to protect the position of the intervening creditor state. What alternatives to intervention were available to the United States to protect the legal rights of its nationals in Cuba, given the unwillingness of Castro to submit disputes to settlement and given the unwillingness of the OAS to act? This is an issue quite separate from the overriding tendency of the United States to ignore certain legal restraints under the pressure of waging the Cold War.

IV. LEGAL DOCTRINES PERTAINING TO NONINTERVENTION

An exposition of relevant legal doctrine reveals why the anti-Castro conduct of the United States is regarded here as illegal. An acknowledgement of illegality seems to be a necessary starting-point for a useful evaluation of the United States' response to the Castro challenge. Artificial attempts to classify American conduct as legal obscure the real issue: can we adhere to the *legal* principle of non-intervention in the light of the general political character of the Cold War?⁶⁷ That is, given the Cold War and the tendency of the Commu-

⁶⁶ For text of U.S. Note to OAS on Cuba see N.Y. Times, October 29, 1960, p. 2.

⁶⁷ This general question was asked and answered negatively in a provocative book—Loewenstein, *Political Reconstruction* (1946).

nist movement to extend to the hemisphere its anti-democratic social order is it tolerable for the liberal democratic states to be bound by legal rules prohibiting intervention? To date our leaders have not been willing to put the question in this way. Instead we have been given a very strained account of the facts of American participation⁶⁸ and a remarkably narrow interpretation of the relevance of the nonintervention commitment.⁶⁹

In view of this it would seem helpful to indicate the reasons why our legal commitments have been violated by our participation in the battle against the Castro regime. We are provided, in addition, an apt occasion, first, for revaluating the adequacy of these particular legal standards in the kind of world that exists at present. Second, the failure of the interventionary course in Cuba allows us to rediscern the political strength of the nonintervention principle; that is, our concern with the politics of the Cold War may have led us to fail to perceive the law-reinforcing higher relevance of the politics of nationalism. Hence, the Cold War rivals, intent on keeping their conflict safely short of nuclear war, may come to discover that it is *mutually* advantageous to adhere, on a reciprocal basis, to a strict interpretation of the rules of nonintervention. But to perceive this possibility it is necessary to understand clearly the breadth of the nonintervention requirement, especially as it has developed in the Western Hemisphere. To reach this result we must carefully avoid construing nonintervention in a political manner (that is, to legitimate national conduct). This approach suggests that national policy may not always be consistent with national interest. Such a discovery might itself help to avoid the kind of tactical miscalculation that prompted us to help the rebels invade Cuba. It might even restrengthen the belief that the rule of law retains political vitality despite the tensions of the Cold War.⁷⁰

A. *General Considerations*

This is a vague, confusing, and complex matter. For while there is general agreement that the duty to refrain from intervention is an implied correlate of the right of national independence and sovereignty, there is considerable controversy as to the nature of this duty. It is

⁶⁸ *E.g.*, the defensive position taken by U.S. officials in the United Nations and elsewhere with the unchallenged accounts in the U.S. press.

⁶⁹ President Kennedy suggested in his address "The Lesson of Cuba" that we would not attack Cuba with military force because it would have been "contrary to our traditions and to our international obligations," thereby implying that what we had done was, in contrast, consistent with our traditions and legal obligations. But, as will be shown, this can not fairly be said to be the case.

⁷⁰ See Letter of Professor John P. Roche, N.Y. Times, May 9, 1961, p. 36; letter signed by 43 Princeton professors, N.Y. Times, June 1, 1961, p. 34.

clear that no nation may use or threaten to use armed force to impose its will upon another nation except when acting in self-defense against an armed attack.⁷¹ But it is less evident to identify conduct as a prohibited use of force. Coercive interference by means other than armed attack—hostile propaganda, economic boycott, subversion, aid to counterrevolutionaries—appear to be equally embraced within the implied right of a nation to have its independence respected by other nations. The concept of nonintervention also seeks to implement the doctrine in international law that acknowledges the equality of states. Nonintervention is the way in which strong states fulfill the obligation to accept the equality of weak states. Therefore, in general, it is interpreted to impose a duty upon strong states to refrain from manipulating, by the use of coercion, the affairs of weak states. The legality of specific conduct would depend less upon the means used than the ends sought, provided only that the allegedly intervening state possessed superior strength; that is, it would not be intelligible to talk of Cuba intervening in the internal affairs of the United States; yet, Cuba might be guilty of intervention in the affairs of the Dominican Republic.⁷²

The seriousness of intervention depends partly on the extent of its objective in relation to the independence of the target state. For instance, the early coercive objectives of the United States (*e.g.*, the cut in the sugar quota and the economic embargo) sought only to influence internal Cuban policy (*e.g.*, to discourage expropriations of property and involvement in the Soviet Bloc); whereas, the support for the rebel exiles evidently sought to replace the Castro government with one more in accord with American interests.

We must also look at the intensity of coercion to determine the seriousness of an intervention. It is one thing to express sympathy for a revolutionary movement, as we did for Castro when he was on the verge of victory in 1958 and quite another to supply revolutionaries with arms, training, and transportation as we have done for Artime, Ray, and Cardona in 1961.

Finally, the seriousness of intervention also depends upon the character of the provoking motive. The spectrum contains self-defense at one end and the gratuitous extension of national power at the other. Interventions to restore internal order, to prevent the persecution of minority groups, to overthrow an oppressive or colonial government, to enforce by self-help the legal duties of the target state with respect to private investment or public debt, to reinstate a governing elite friendly to a Cold War bloc leader, to discourage the use of territory

⁷¹ *Supra*, note 63.

⁷² It is, in general, the *relative power advantage* that makes intervention possible.

as a base for terrorist activities⁷³ are typical illustrations of conduct that is more difficult to classify. Some of the difficulty arises because there is no adequate vertical institution with compulsory jurisdiction to determine whether contested acts constitute "interventions."⁷⁴ Furthermore, the instability introduced by the Cold War induces double interventions by the bloc leaders, each intervening on behalf of its preferred elite; this makes a failure to intervene an acquiescence to intervention; whereas, an equivalent intervention leads to a neutralization of the first intervention. Thus, the second intervention may be noninterventionary in effect—leaving the target state about where it would have been without *either* intervention.⁷⁵

Additional difficulty arises because the legal principles forbidding intervention are so frequently confused with moral and political considerations which favor a policy of selective intervention.⁷⁶ The problem of classification is further enhanced by the reliance of customary international law upon patterns of practice to change legal rules⁷⁷ and by the tendency for complementary opposed legal norms to be available to national actors for contrary descriptions of their conduct.⁷⁸

Despite these difficulties of classification, two rather clear conclusions are possible: first, nations may not use armed force to carry out an interventionary policy unless they have been the victims of an armed attack and are acting in self-defense; second, recourses to interventionary coercion, other than by armed force, are incompatible with the fundamental doctrines of international law relating to sovereignty, territorial jurisdiction, equality of states, and national independence.

The United Nations Charter as the organic law of the world community, bears significantly upon the status of interventionary conduct. Article 2(4) incorporates the legal commitment to renounce the use of force in international relations; Article 2(7) withholds from the Organization the right to intervene in domestic affairs unless essential to the paramount duty to maintain world peace;⁷⁹ Article 1(4) endorses the

⁷³ This was part of Israel's claim of justification in the 1956 Sinai campaign.

⁷⁴ The use of the United Nations to determine issues of this sort manifests the slow growth of vertical control over the use of force, especially outside the Cold War.

⁷⁵ Falk, *op. cit. supra* note 10, at 169.

⁷⁶ Letter of Professor Wolfgang Friedman, N.Y. Times, May 1, 1961, p. 28.

⁷⁷ Macgibbon, "Customary International Law and Acquiescence," 33 Brit. Yb. Int'l L. 115, 195 (1959).

⁷⁸ McDougal and Feliciano, "Legal Regulation of Resort to International Coercion: Aggression and Self-Defense in Policy Perspective," 68 Yale L. J. 1057, 1059-1063 (1959).

⁷⁹ That is, the United Nations is made subject to a limited doctrine of nonintervention by the terms of the Charter. This is a complicated question that can only be raised here in general terms.

principle of equal rights and self-determination; Article 33 pledges states to seek a pacific solution to any dispute that is likely to endanger peace; Article 52(3) instructs the Security Council to seek pacific settlement of disputes through the utilization of available regional organizations; and, in addition, of course, the entire machinery of the United Nations is designed to promote the maintenance of peace. Much of the Charter as well as the Uniting For Peace Resolution are relevant in this respect. The United Nations Charter is very unspecific in its reference to prohibitions against coercion other than armed force. The entire apparatus of the Charter is aimed to re-enforce the traditional view of the sovereign equality of states, which rests upon the entailed principle that no state is permitted to interfere in the internal affairs of other states. The legality of American use of coercion against Cuba must be viewed in relation to this Charter background.

B. *Specific Legal Commitments*

United States participation in the armed invasion of Cuba on April 17, 1961 clearly violated legal obligations contained in binding international agreements defining the international relations of states in the Western Hemisphere (other than Canada). In addition, American efforts to apply pressure by recourse to earlier coercive economic measures, especially the embargo on trade and the cut in the sugar quota, constituted illegal indirect intervention. The development of law pertaining to nonintervention in this hemisphere is an expression of protest against the extensive practice by the United States of intervention in the internal affairs of Latin American countries. The Monroe Doctrine was proclaimed in 1823 to discourage the efforts of the Holy Alliance to recover for Spain sovereign control over her Latin American colonies that had declared their independence early in the nineteenth century.⁸⁰ It was largely designed to discourage European intervention in Latin American internal affairs. When this danger receded, the Monroe Doctrine was retained and expanded to serve as a multi-pronged rationalization for American intervention in the internal affairs of Latin American countries on whatever occasion it seemed to serve the national interests of the United States to do so. President Theodore Roosevelt's explanation of the United States intervention in Panama in 1903 to protect the construction of the Canal expressed well the spirit of American interventionary practice:

We, in effect, policed the Isthmus in the interests of its inhabitants and of our own national needs, and for the good of the entire civilized world. Under such circumstances the Government of the United States would have been guilty of folly and weakness,

⁸⁰ THOMAS, 10-20.

amounting in their sum to a crime against the nation, had it acted otherwise than it did. . . .⁸¹

Our later Monroe Doctrine practice was a curious blend of imperialism and paternalism. We intervened to protect American investments and, at the same time, we kept the Latin American penchant for revolutionary politics from leading nations into a condition of chaos, and eventual bankruptcy. Our object was to maintain the social *status quo* in an atmosphere of maximum political stability—this being the most favorable situation for the promotion of our economic interests. We did not use our interventionary domination, however, as a pretext for permanent occupation. Nevertheless, all vocal groups in Latin America resented the interventionary claims and practices of the United States. The Latin American view prevailed that the Monroe Doctrine should be regarded as a unilateral declaration of policy by the United States rather than as a regional understanding governing international relations in the hemisphere.⁸² Pressure mounted after World War I, and the United States was gradually persuaded to join in legal pledges to refrain from intervention, thereby abandoning its role under the Monroe Doctrine.⁸³

The last explicit defense of the American right to intervene was made by Charles Evans Hughes, as Secretary of State, at the Sixth Pan American Conference held at Havana in 1928. He put the United States position candidly:

Let us face facts. The difficulty, if there is any, in any one of the American Republics, is not of any external aggression. It is an internal difficulty, if it exists at all What are we going to do when the government breaks down and American citizens are in danger of their lives? . . . Now it is a principle of international law—I would call it interposition of a temporary character—for the purpose of protecting of lives and property of its nationals.⁸⁴

Despite the ability of the United States in 1928 to block the incorporation of nonintervention into a treaty at Havana, several important legal steps were taken to curtail, indirectly, the scope of the interventionary claim. For purposes of evaluating the Cuban situation,

⁸¹ Quoted by GRABER, 138.

⁸² A quasi-legitimation of the Monroe Doctrine was given by Article 21 of the Covenant of the League of Nations: "Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe Doctrine, for securing the maintenance of the peace." Sohn, *Basic Documents of the United Nations*, 277, 283 (1956) [hereinafter cited as SOHN].

⁸³ The process is described by Bemis, *op. cit. supra*, note 29, at 226-294.

⁸⁴ Report of the Delegates of the United States of America to the Sixth International Conference of American States held at Havana, Cuba, January 16 to February 20, 1928, 14 (1928).

the most significant of these steps was the Convention on the Rights and Duties of States in the Event of Civil Strife, Article 1 of which seems directly to establish the illegality of American support for the Castro exiles:

The contracting states bind themselves to observe the following rules with regard to civil strife in another one of them:

1. To use all means at their disposal to prevent the inhabitants of their territory, nationals or aliens, from participating in, gathering elements, crossing the boundary or sailing from their territory for purpose of starting or promoting civil strife.

2. To disarm and intern every rebel force crossing their boundaries, the expense of internment to be borne by the state where public order may have been disrupted. The arms found in the hands of the country granting asylum, to be returned, once the struggle has ended, to the state in civil strife.

3. To forbid the traffic in arms and war material, except when intended for the government, while the belligerency of the rebels has not been recognized, in which latter case the rules of neutrality shall be applied.

4. To prevent that within their jurisdiction there be equipped, armed or adapted for warlike purposes any vessel intended to operate in favor of the rebellion.⁸⁵

At the same time a Convention on Asylum was adopted to authorize signatories to grant asylum to political fugitives from other countries in the interests of "humanitarian toleration."⁸⁶ Both legal commitments have obvious relevance to the duties of the United States with respect to the Castro exiles. It is acceptable to give sanctuary, but it is certainly illegal to help exiles form a revolutionary movement on our territory, and illegal to tolerate even passively the use of our territory to foment civil strife in another country.⁸⁷

There is a horizontal implementation of such a legal standard expressed generally in domestic legal provisions applicable to neutrality,⁸⁸ and, more particularly, in a federal provision of the United States Code making it a crime to use our territory as a base for hostile military operations against a state with which we are at peace:

§ 960 Expedition against friendly nation.

Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money

⁸⁵ Convention on the Rights and Duties of States in the Event of Civil Strife, 22 Am. J. Int'l. L. Supp. 159 (1928).

⁸⁶ Convention on Asylum, 22 Am. J. Int'l. L. Supp. 158 (1928); but see Ambassador Stevenson's defense of U.S. grants of asylum in the U.N.: Stevenson, "Statement of April 20," 44 Dep't State Bull. 681, 684 (1961).

⁸⁷ This much of the doctrine of nonintervention seems to be solidly accepted on the Western Hemisphere.

⁸⁸ 22 U.S.C.A. §§ 441-457 (1939).

for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district or people with whom the United States is at peace, shall be fined not more than \$3,000 or imprisoned not more than three years, or both.⁸⁹

This seems to apply clearly to Cubans or Americans that participated in the direction and execution of the April 1961 invasion, so far as their action took place "within the United States."⁹⁰ The United States was, of course, "at peace" with Cuba, despite the fact that diplomatic relations were broken in January 1961. In any event activity in the United States forbidden by § 960 long antedated the termination of diplomatic relations.

This aspect of the Cuban invasion has also received an important vertical expression in the form of the Draft Code of Offenses Against the Peace and Security of Mankind which was adopted by the International Law Commission of the United Nations in 1954. The Draft Code imposes criminal responsibility upon individuals who commit specified acts. Included among the provisions of Article 2 one finds:

(4) The organization, or the encouragement of the organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions.

(5) The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State, or the toleration by the authorities of a State of organized activities calculated to foment civil strife in another State.

(6) The undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State.

(9) The intervention by the authorities of a State in the internal or external affairs of another State, by means of coercive measures of an economic or political character in order to force its will and thereby obtain advantages of any kind.⁹¹

Article 3 extends the responsibility of the Code to a Head of State or to the responsible governmental official, and Article 4 ex-

⁸⁹ 18 U.S.C.A. § 960 (1948).

⁹⁰ Ambassador Stevenson in the course of a United Nations debate granted the force of this legal restraint when he said, "I wish to make clear also that we would be opposed to the use of our territory for mounting an offensive against any foreign government." "Statement of April 17," 44 Dep't State Bull. 668 (1961).

⁹¹ SOHN, 99-100.

cludes the defense of superior orders provided the individual charged retained the possibility to refuse the orders. Such a Draft Code is not a binding international agreement, but its endorsement by the International Law Commission may be taken as expressive of standards accepted by the international community. Given the distinctive processes for law-making on a global basis such an endorsement may be considered as a stage in the enunciation of a new legal doctrine. In fact, the rationale of the Nuremberg and Tokyo Judgments in the war crimes trials after World War II is illustrative of the way in which a global commitment to a standard of civilized behavior can be transformed on an *ad hoc* basis into an applicable legal obligation. This was certainly true with respect to the use of "Crimes against Humanity" as a basis for individual responsibility under international law at Nuremberg. The sweeping relevance of such standards—even if considered as stating only the aspirations of the world society—to the encouragement of the counterrevolutionary cause of the Castro exiles is too obvious to require specific comment.

The willingness of the United States to commit itself directly and explicitly to nonintervention resulted from the view taken of Latin American relations by Franklin D. Roosevelt. As early as 1928 Roosevelt wrote an article foreshadowing the later legal-diplomatic shift of the United States:

It is possible that in the days to come one of our sister nations may fall upon evil days; disorder and bad government may require a helping hand be given her citizens as a matter of temporary necessity to bring back order and stability. In that event it is not the right or the duty of the United States to intervene alone.

"[R]ather," he adds, significantly, it is "the duty of the United States to give intelligent joint study to the problem, and, if the conditions warrant, to offer the helping hand or hands in the name of the Americas. Single-handed intervention by us in the internal affairs of other nations must end; with the cooperation of others we shall have more order in this hemisphere and less dislike."⁹² This later matured into the Good Neighbor Policy with its stress upon common interest and cooperative action. Accordingly, in 1933 at Montevideo a Convention on the Rights and Duties of States specified in Article 8 that "No state had the right to intervene in the internal or external affairs of another."⁹³ This Convention was subject to a reservation by the United States which advised that the principle of nonintervention, in the ab-

⁹² F. Roosevelt, "Our Foreign Policy," 6 Foreign Aff. 573 (1928).

⁹³ International Conferences of American States, First Supplement, 1933-1940, Convention on Rights and Duties of States, 121, 122 (1940) [hereinafter cited as INTERNATIONAL CONFERENCES].

sence of a common standard of definition, would be construed in the light of "the doctrines and policies . . . embodied in the different addresses of President Roosevelt . . . and in the law of nations as generally recognized and accepted."⁹⁴

It is significant to observe that the United States refused to accept the broad definition of intervention that had been included in the draft formulation of Article 8 that was proposed at Montevideo: "Any act of a State, through diplomatic representation, by armed force, or by any other means involving effective force, with a view to making the State's will dominate the will of another State, and, in general, any maneuver, interference or interposition⁹⁵ of any sort, employing such means, either directly or indirectly in matters of obligation of State, whatever its motive, shall be considered as Intervention, and likewise a violation of International Law."⁹⁶ This proposed definition and its rejection by the United States is very suggestive with respect to what was the scope of nonintervention sought by the Latin American countries as contrasted with the legal obligation the United States was ready to accept. A perceptive student of Latin American diplomacy has well summarized the significance of this first legal pledge to refrain from intervention by the United States:

The Montevideo pledge meant that the United States had abjured *armed* intervention in the *internal* affairs of other countries. By implication, intervention through means other than armed force could continue.⁹⁷

Because of broader legal commitments that came later it is of no practical importance to determine whether the United States sponsorship of the invasion by the Castro exiles constituted a violation of Article 8 of the Montevideo Convention on the Rights and Duties of States.⁹⁸ Certainly, such sponsorship comes within the prohibition of the Additional Protocol Relative to Non-Intervention that was concluded at Buenos Aires in 1936 and later ratified by the United States with neither a reservation nor a dissenting vote in the Senate. The Preamble of the Additional Protocol recalled the Montevideo nonintervention pledge, and can be appropriately regarded as a full acceptance

⁹⁴ INTERNATIONAL CONFERENCES, 124.

⁹⁵ This recalls Secretary Hughes' distinction between intervention and interposition made at Hanava in 1928, see *op. cit. supra*, note 84.

⁹⁶ Seventh International Conference of American States. First, Second and Eighth Committees, Minutes and Antecedents, 165 (Montevideo 1933).

⁹⁷ GRABER, 205.

⁹⁸ President Kennedy's interpretation of the nonintervention doctrine amounts to reaffirming the Montevideo pledge as the measure of the U.S. obligation. From the viewpoint of law, however, this neglects the broader commitments subsequent to 1933 subscribed to by the United States. For the Kennedy position see *supra* pp. 7-8.

by the United States of the Latin American insistence upon a doctrine of absolute nonintervention.⁹⁹ Articles 1 and 2 contain the substance of the legal obligation accepted by the United States:

Article 1.—The High Contracting Parties declare inadmissible the intervention of any one of them, directly or indirectly, and for whatever reason, in the internal or external affairs of any other of the Parties.

The violation of the provisions of this Article shall give rise to mutual consultation, with the object of exchanging views and seeking methods of peaceful adjustment.

Article 2.—It is agreed that every question concerning the interpretation of the present Additional Protocol, which it has not been possible to settle through diplomatic channels, shall be submitted to the procedure of conciliation provided for in the agreements in force, or to arbitration, or to judicial settlement.¹⁰⁰

The United States accepted the obligation to refrain from interventions other than by armed force and to submit a dispute as to what constituted intervention to a supranational body of resolution. This would, as well, imply a commitment to abide by the results of such a third-party determination.

The failure of the nonintervention system to protect the national independence of Spain during its civil war¹⁰¹ together with the aggressive extension of Nazi influence to some of the South American nations led to an effort to assure collective resistance to an extra-hemispheric intrusion. The threat of a concerted European intervention in the Western Hemisphere was present for the first time since the Triple Alliance at Troppau in 1820 had proposed to win back Spain's lost colonies in Latin America; this was the situation, it will be recalled, that prompted the Monroe Doctrine. There was no prospect of legitimating a revival of a unilateral right of protective intervention to be exercised on behalf of hemispheric welfare by the United States. Latin American states had no inclination to give up the doctrine of nonintervention. Instead an idea of collective intervention to prevent extra-hemispheric intrusion began to take definite shape in the Declaration of the Principles of the Solidarity of America approved at Lima in 1938. The Preamble of the Declaration of Lima recalled the Protocol of Non-intervention, while the operative portions of the declaration stated the importance of "continental solidarity" so as to defend each American state "against all foreign intervention or activity that may

⁹⁹ Fenwick, "Intervention; Individual and Collective," 39 *Am. J. Int'l L.* 645, 656 (1945).

¹⁰⁰ *INTERNATIONAL CONFERENCES*, 191.

¹⁰¹ Cf., Padelford, *International Law and Diplomacy in the Spanish Civil Strife* (1939).

threaten them" by recourse to effective collective action.¹⁰² The doctrine of absolute nonintervention supplemented by a declaration of solidarity to resist extra-hemispheric intrusions of influence by *collective* action continue as the explicit foundation of the legal relations between the United States and Latin America.¹⁰³

The Declaration of Lima was supplemented in 1940 by the Act of Havana which declared that "any attempt on the part of a non-American State against the integrity or inviolability of the territory, the sovereignty or the political independence of an American State shall be considered an act of aggression"¹⁰⁴ and that cooperative action should then be taken in the spirit of collective self-defense.¹⁰⁵ The concern was to defend against the emergence in South America, by subversion or otherwise, of a government sympathetic to the Axis powers. In 1942 as a result of the threats posed by World War II the inter-American system created the Emergency Advisory Committee for Political Defense of the Continent which was quite successful in using collective non-recognition as a means to resist the emergence of pro-Axis governments.¹⁰⁶ Hemispheric consensus gave strong political backing to the shift from the unilateral to multilateral resistance against extra-hemispheric interference.¹⁰⁷ In 1945 the Act of Chapultepec adopted at an Inter-American Conference on War and Peace reaffirmed the commitment to hemispheric solidarity and reciprocal assistance.¹⁰⁸ Such sentiments were given effective implementation in the Inter-American Treaty of Reciprocal Assistance concluded at Rio de Janeiro in 1947.¹⁰⁹

The most comprehensive effort to establish a legal order for the Americas is contained in the Charter of Bogotá that was signed in 1948.¹¹⁰ Particularly relevant is its reformulation of the absolute nonintervention obligation to cover collective intervention in Article 15:

No State or group of States has the right to intervene directly or indirectly, for any reason whatever, in the internal or external affairs of any other state. The foregoing principle prohibits not

¹⁰² INTERNATIONAL CONFERENCES, 308-309.

¹⁰³ This was succinctly put by Secretary Herter at Santiago in 1959. See *op. cit. supra*, note 15.

¹⁰⁴ INTERNATIONAL CONFERENCES, 360.

¹⁰⁵ *Id.* at 373.

¹⁰⁶ THOMAS, 251.

¹⁰⁷ Suppose that a society chooses to become "communist" by democratic processes and without external interference?

¹⁰⁸ Full account and analysis found in Caynes, "The Inter-American System and The Conference of Chapultepec," 39 Am. J. Int'l L. 504 (1945).

¹⁰⁹ SOHN, 110.

¹¹⁰ *Id.* at 117.

only armed attack but also any other form of interference or attempted threat against the personalty of the State or against its political, economic and cultural elements.

We must use this broad prohibition of intervention in order to appraise the legality of the anti-Castro course of United States policy. Such a legal obligation can not be satisfied merely by refraining from the use of armed forces in an invasion, as was implied when President Kennedy said:

While we could not be expected to hide our sympathies, we made it repeatedly clear that the armed forces of this country would not intervene in any way.

Any unilateral American intervention, in the absence of an external attack upon ourselves or an ally, would have been contrary to our traditions and to our international obligations.¹¹¹

This is true, but it is not responsive to the charge of indirect intervention brought against the United States by Cuba and others. It suggests a scope of nonintervention that is arguably in accord with Article 8 of the Montevideo Convention and the Charter of the United Nations, but it does not acknowledge the scope of the legal duty imposed upon the United States by Article 15 of the Charter of Bogotá. The conduct of the United States also seems to violate Article 16 of the same Convention:

No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind.

Such governing standards seem to compel a conclusion of illegality.

Article 6 of the Rio Treaty of Reciprocal Assistance provides:

If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack . . . the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent.¹¹²

The Cuban Revolutionary Council has urged Article 6 as a basis for collective action by the OAS against Castro. This seems somewhat strained. It presumably makes reference to the influence exerted by the Soviet Union, and possibly Communist China, upon Cuban internal affairs. But the evidence presently available indicates that the Sino-Soviet interference extends only to offers of military support in the

¹¹¹ Kennedy, *op. cit. supra*, note 16, at 659.

¹¹² SOHN, 111.

event of an armed attack by the United States upon Cuba¹¹³ and widespread cooperation with and support for Castro in the area of trade and commerce. But if this is characterized as "aggression" it makes a mockery of the concept in a world in which bloc leaders on both sides of the Cold War consistently act to ingratiate themselves with unaligned nations. Would any one contend that United States aid to Tito in Yugoslavia or even to Poland constitutes aggression?

However, the special status of the international Communist movement in inter-American relations may give some legal basis to those who urge collective action by the OAS. At the Bogota Conference in 1948 and again at the Foreign Ministers Meeting of American States held at Washington in 1951 all the American republics went on record as "condemning the interventionist character of the internationalist Communist movement and expressing their determination to take the necessary measures to counteract its subversive activities."¹¹⁴ In 1954 at the Tenth Inter-American Conference a Declaration of Solidarity was adopted which condemned "[t]he activities of the international communist movement as constituting intervention in American affairs" and declared that "the domination or control of any American State by the internationalist communist movement, extending to this hemisphere the political system of an extra-continental power . . . would call for a meeting of consultation to consider the adoption of appropriate action in accord with existing treaties."¹¹⁵

Regardless of the desirability of making a determination in advance that the emergence of a Communist oriented government in the hemisphere has been achieved by extra-continental intervention,¹¹⁶ it nevertheless abridges the principle of nonintervention only to the extent of authorizing collective action by the OAS.¹¹⁷ It is a Monroe Doctrine for the Americas that shifts the responsibility from the United States to the republics acting together in joint protective action. Thus the legal discretion of the United States to act on its own is not enlarged by the formal hemispheric action condemning the international communist movement as interventionary. Such condemnation has been reiterated under the impact of developments in Cuba at Inter-American conferences by the Declaration of Santiago at Chile in 1959 and by the Declaration of San José at Puerto Rico in 1960.¹¹⁸

¹¹³ For validity of collective defense concept see Article 51 of the U.N. Charter quote, *supra* note 63.

¹¹⁴ Tenth Inter-American Conference, Dep't of State Publication 5692, 8 (1955).

¹¹⁵ Text reprinted in Documents in American Foreign Relations 1954, 412 (1955).

¹¹⁶ See text on the Lima Declaration directed against Germany and Italy in the World War II period.

¹¹⁷ See Falk, *op. cit. supra*, note 10 at 181-183.

¹¹⁸ Note relevance of these Declarations to Article 7 of the Rio Treaty calling for the peaceful settlement of conflicts between States in the hemisphere.

However, the Latin American republics have not been disposed to do more than to join in a collective condemnation of the communist movement. There has been no willingness to change the legal status of the doctrine of nonintervention or even to join in collective sanctions against governments that have been alleged to be communist-dominated.

The perception of these limits to the willingness of the Latin American republics to act against expansions of communist influence in the hemisphere has increasingly motivated the United States to resume its role as unilateral actor. Thus the United States is widely assumed to have taken a decisive interventionary role in the organization of the revolution that succeeded in overthrowing the pro-Arbenz government in Guatemala in 1954.¹¹⁹ American participation, although provoking widespread criticism, was handled subtly enough so that the issue of intervention in violation of treaty obligations was never sufficiently clear. However, the overtness of the American role in the fight against Castro makes quite clear the interventionary character of United States conduct. The absence of collective authorization by the OAS is decisive for an evaluation of the legality of the unilateral help and comfort given the plan of the Cuban Revolutionary Council to invade Cuban territory to overthrow Castro and of the economic coercive measures. Regardless of the correctness of the characterization of the Castro government as "Communist" and as a virtual member of the Soviet Bloc, such coercive conduct by the United States amounts clearly to intervention forbidden by Article 15 of the Charter of Bogota (as well as such earlier instruments as the Additional Protocol on Non-intervention).¹²⁰

One is led, then, to the inescapable conclusion that the United States has violated its legal obligations to refrain from intervention in the internal affairs of Cuba by its use of coercive economic sanctions (especially the export embargo) and by its support for the hostile military venture of the exiles carried out in April 1961. In addition, the United States would seem to be flagrantly guilty of violating its obligation under the Civil Strife Convention to remain aloof in the face of an internal struggle for power in Latin America. Although less evident, the United States would seem to have abused the legal right to confer asylum upon political refugees by allowing the exiles to form a counter-revolutionary plot on its territory. Furthermore, the status of United States conduct seems legally dubious in relation to the United Nations Charter provisions requiring pacific settlement

¹¹⁹ See generally Fenwick, "Jurisdictional Questions Involved in the Guatemalan Revolution," 48 *Am. J. Int'l L.* 597 (1954).

¹²⁰ See text above.

of disputes and respect for national independence, and quite contradictory to the aspirational Draft Code of Offenses against the Peace and Security of Mankind that was adopted, with the concurring vote of the United States member, by the International Law Commission. And finally, the conduct of Americans who helped to finance, organize, and execute the April invasion plan appears to constitute a crime under the domestic laws of the United States.

V. A PROVISIONAL ASSESSMENT

What do these events portend for the future of inter-American relations? It is too early to attempt a real assessment. Even the future shape of Cuban-American relations remains highly uncertain. An exchange of tractors for prisoners may not re-establish harmony, but it provides some hope for a mutual willingness to relax tensions. By acting as a sponsor for the Cuban rebels the United States received a political and moral defeat that is not unlike the miscalculation and setback experienced by England and France in the 1956 Suez Campaign. But the experience can also be of enormous instructive value. In this regard, I should like to conclude by identifying some of the problems and challenges illuminated by the relations of the United States with Cuba since Castro took over in 1959.

(1) There appears, in one sense, to be manifest a remarkable degree of historical continuity both within Cuba itself and in the response of the United States to a situation prevailing in a Latin American neighbor that was destructive of private investment and antagonistic to our desire to maintain hemispheric political supremacy. The pattern of Castro's authoritarian government basing itself upon the strength of his personality is consistent with a tradition of charismatic leadership deeply embedded in Cuban history since colonial times.¹²¹ It is nothing new for Cuba to be dominated by a dictator who suppresses cruelly the political opposition, eliminates civil liberties, and controls mass media of communication for propagandistic purposes. The difference, from the viewpoint of a free press, between newspapers run by a reactionary elite friendly to Batista and run by the Castro government is not very great. It is quite true that Castro has betrayed the democratic principles proclaimed as his program in Sierra Maestra in 1957,¹²² but, in so doing, he has *continued* rather than *varied* the internal Cuban atmosphere. Castro has brought into power a dictatorship from the left. This has destroyed the former middle class, perhaps

¹²¹ See generally Fitzgibbon, *op. cit. supra*, note 2; Tannenbaum, "The Political Dilemma in Latin America," 38 Foreign Aff. 497 (1960).

¹²² This argument is made fully in the State Department white paper on Cuba, see *op. cit. supra*, note 60.

irreparably damaging Cuban development, and certainly antagonizing the moderate group that supported him during his struggle for power. One does not find many peasants or workers among the Castro exiles, nor is there much evidence of their disenchantment with Castro. The element of continuity in the internal political life of Cuba is important if we are to assess accurately the expectations of the Cuban population. It is improbable that they will miss liberties that were never possessed.

The hostile action of the Castro government has totally destroyed the value of the huge private investment by Americans in Cuba and has brought to an end profitable international trade relations between the two countries. In addition, Cuba has turned for support increasingly to the extra-hemispheric political enemies of the United States. The result has been to intrude Communist influence in the affairs of a Latin American state, threatening our relative power position in the Cold War. Cuba's success serves as an example to other ambitious elites throughout Latin America. In addition, Castro was eagerly willing to export his revolution, thus disrupting internal stability throughout the Caribbean,¹²³ displaying a cavalier disregard in his early months of power for the principle of nonintervention. These developments illustrate extreme instances of the reasons accounting for United States intervention in Latin American affairs: (1) political conditions hostile to American investor interests; (2) the apparent extension to the hemisphere of the influence of a powerful extra-continental nation. The United States has responded, except for its failure to resort to dictatorial interference by force of arms, by recourse to a policy of "protective intervention." This suggests continuity with the hegemonial claims asserted by the United States during the later stages of the Monroe Doctrine. Interposed legal commitments to the absolute doctrine of nonintervention preclude us, however, from a revival of the Monroe Doctrine to meet the Sino-Soviet threat without embarking on a dubious path of explicit law-breaking. We are no longer free to act unilaterally.¹²⁴

(2) The United States concern with the protection of private investment seems to induce our leadership to confuse socialism with international communism. The effort of Castro to reconstitute Cuban society by recourse to a radical and socialistic program must be kept rigidly separate from considerations relevant to the distribution of power in the Cold War. Otherwise we dangerously foreclose political cooperation with socialist societies, undesirably limiting our flexibility in foreign affairs. It is my opinion that a socialist response

¹²³ Cf., Stebbins, *The United States in World Affairs* 1959, 353-357 (1960).

¹²⁴ See Halle, "Lessons of the Cuban Blunder," *The New Republic*, June 5, 1961, 13, 15.

is needed in the less developed parts of the world to hasten a higher standard of living, a rapid rate of industrialization, and an equitable distribution of wealth and services to the lower classes. The United States must encourage such developments so as to promote healthy, progressive, and stable societies in Latin America. Hence, the apparent willingness to brand Castro as a "Communist" partly because he expropriated American property is a particularly regressive aspect of the United States response to Castro.¹²⁵ It almost certainly contributed pressure upon Castro to seek external support from the Sino-Soviet bloc.¹²⁶ For if the United States withdraws support from a radical social program¹²⁷ the national leaders will almost certainly turn for help to the communist bloc countries. This lesson was first taught the West by Nasser's reaction to the withdrawal of United States support for Egypt's Aswan Dam project; Castro has re-instructed us in this respect. A stable socialist society unaffiliated with either power bloc is in the interests of the United States in most parts of the world.

(3) The defeat of the rebel invasion, the reaction of public opinion throughout Latin America, and the domestic criticism of United States intervention suggest the political vitality of the legal commitment to a policy of absolute nonintervention. The sentiment of the community in Latin America strongly backs the legal norm. This is a strong argument for adherence to nonintervention by the United States. It may indicate that our energy should be given over to the development of effective, compulsory remedies that allow creditor states some opportunity to pursue their claims against debtor states. The absence of remedies against Cuba certainly contributed pressure in the direction of intervention. Also considerations of reciprocity suggest the mutual benefit of regional stability that may result for both Cold War rivals if standards of nonintervention become operational. Khrushchev's message to President Kennedy¹²⁸ indicated the destabilizing effect upon East-West relations that is likely to flow from an interventionary policy reciprocally pursued against neighboring hostile states.

¹²⁵ It is "regressive" because it tends to confuse internal questions of social change (socialism) with an external power affiliation (communism).

¹²⁶ In addition, the relative internal strength of the Communist Party was enhanced thereby. Fitzgibbon, *op. cit. supra*, note 2, at 117-118.

¹²⁷ A "radical social program" is a basic reordering of the society along new lines. It is not a matter of stabilizing the existing social order by external capital grants. The United States has used its influence to support *reformist* rather than *radical* social change in Latin America. This policy tends to perpetuate the basic inequities of the prevailing social orders, especially inequalities in income.

¹²⁸ Quoted *supra* at 9.

(4) Correlated to the vitality of the nonintervention pledge is the relative insufficiency of the OAS as an organ for the exercise of collective responsibility. The member states from Latin America are extremely reluctant to cooperate with the United States in the use of coercive measures to resist the extension of communist influence to the hemisphere. Pledges of sentiment can be elicited at inter-American conferences (Caracas, Santiago, and San Jose), but implementing action is not forthcoming. This is another source of pressure upon the United States to resort to intervention, despite conflicting legal obligations. The expectation of solidarity—as a substitute for the Monroe Doctrine—has not materialized as yet in response to communism. This contrasts with the relative success of collective action, implementing the Declaration of Lima (1938), and designed to resist fascist infiltration. What alternatives to unilateral intervention are open to the United States, given its perception that communist control of a Latin American country imperils significantly its national security?

(5) The United Nations did not seem able to make a legal determination that objectively reflected Cuba's complaints about United States intervention. The General Assembly passed a mild resolution urging peaceful settlement of the U.S.-Cuba dispute by recourse to regional mechanism of adjustment. The force of world condemnation of interventionary conduct, as potentially expressed in the UN, probably did restrain the United States from further or more flagrant coercive action. The formal action taken by the General Assembly did not exhaust its influence over the outcome of the U.S.-Cuban dispute. It is difficult to assess this, but it is important not to neglect it.

(6) A Latin American leader can mobilize intense public support by concentrating internal hostility upon the United States. Castro has had great mass response in his campaign to explain all the defects of Cuban society by pointing to the great dragon in the north. And his charismatic following throughout Latin America stems from his ability to show that the dragon breathes fire but is perhaps made of paper. Other ambitious Latin American leaders can be expected to use latent mass hostility to the United States as a lever of political power.

(7) The emergence of Castro has led the United States to begin taking seriously the needs of its hemispheric neighbors. The new relevance of the Cold War to Latin America will probably benefit many nations through increased participation in foreign aid and loan programs. The moderate leaders of beneficiary countries must realize that Castro has made this possible. This may help to account for their reluctance to use coercion to eliminate Castroism from the hemisphere. So long as Castro remains, the United States will do a lot to keep its friends in the hemisphere satisfied.

(8) There are certain implications of our conduct towards Castro which, although central to calm understanding, are very difficult to evaluate. First, the uniform hypocrisy of our highest leaders in their defense against Cuba's charges that we were contemplating direct or indirect intervention. The extreme hypocritical gesture was made in the United Nations by Ambassador Wadsworth when he said that the United States welcomed information that would enable a strict enforcement of our neutrality laws at a time when it was evidently governmental policy to prepare the Castro exiles for the military expedition that took place in April 1961.¹²⁹ Such blatant falsification in solemn diplomatic situations sets a very bad example, especially in view of the American tendency to speak of action taken to promote national interests in the self-righteous rhetoric of morality. President Kennedy's suggestion that our newspapers accept voluntary censorship is occasion for further alarm in this regard. How can an uninformed or misinformed society remain democratic? How can we trust our own leaders? How can other countries trust us? This is a very serious consequence of the Cuban affair, for the slow development of trust is indispensable to the growth of all international order, especially in the crucial area of arms control. Trust is the horizontal alternative to effective vertical controls.

Second, Cold War pressure has led the United States to act in disregard of its legal obligations. This is very damaging to our campaign to extend further the relevance of law to international relations. More specifically, it reveals the political limits of our treaty commitment to the doctrine of absolute nonintervention. This seems likely to reactivate Latin American suspicions about our willingness to act as a good neighbor under current world conditions. It may further threaten hemispheric solidarity.

Third, the Kennedy Doctrine enumerated a unilateral assumption by the United States of a power that is inconsistent with our legal obligations. It narrowed our nonintervention pledge down in unwarranted fashion to apply only to direct armed intervention by United States military forces even though the applicable treaty provisions are carefully formulated in language broad enough to reach indirect and non-military forms of intervention. Furthermore, President Kennedy announced a possibility of direct armed intervention in the event

¹²⁹ *E.g.*, consider this statement made in a U.N. debate by Ambassador Wadsworth: "It is natural and readily understandable that some Cubans on our shores should want to engage in activities against the government which has done them so much harm. *But the United States has been in no way associated with such activities. On the contrary, we have made unusual and special efforts to prevent violations of our laws.*" (emphasis added). *Second Statement of January 4*, 44 Dep't State Bull. 103 (1961).

that the OAS fails to discharge its responsibility to implement effectively the various Declarations of Solidarity designed to keep the communist movement from extending its influence to our hemisphere. Finally, President Kennedy and others have suggested that the exercise of communist influence in the hemisphere is not "negotiable"; this seems to suggest a policy of force which directly conflicts with our commitments to seek peaceful settlement of *all* international disputes. Perhaps this is necessary for national security, but we should at least be clear about the broad destabilizing effect of such a claim. It is, of course, reciprocally available to our rivals in the Cold War.

Fourth, the role of the CIA raises a number of independently disturbing problems. It is not reassuring to have our international intelligence organ act with such ineptitude. The CIA badly directed the exiles and it disastrously miscalculated the chances of a spontaneous uprising within Cuba. "It used to be said that you would need an enemy if you had a Hungarian for a friend, and Senor Castro has by now concluded that you will never need a friend if you have the CIA for an enemy."¹³⁰ Unfortunately this is more than a sardonic aside. The CIA's failure destroys one's confidence in our capacity to assess military threats that exist or are supposed to exist. This is most serious today when military security is critically dependent on knowing when *not* to push the strike buttons. Additionally, CIA's evident backing of Batista-oriented exiles is shocking. It is inconsistent with our frequently reiterated preference for the emergence of liberal democracy in Latin America, and must make our speeches against dictatorship sound rather hollow. CIA seems to have acted without a clear Presidential mandate; it acted without even a clear internal policy as is suggested by its own split over which exile faction deserved major support. CIA, virtually on its own, seemed to be committing the United States to a very unpopular, dubiously conceived, and disastrously executed policy of counter-revolution in a foreign nation. One is disturbed that such a record has generated so little domestic criticism or concern. One notes the contrast to the widespread opposition in England that arose in 1956 after British participation in the Sinai Campaign was made public.

CONCLUSION

The United States response to the challenge of Castro has been awkward and lawless. It has uncovered a number of dubious assumptions that our policy-makers have used as the basis of our international conduct. It provides, therefore, an excellent opportunity for a reformulation of the relevance of law to politics, and a recommitment by

¹³⁰ Talk of the Town, New Yorker, May 13, 1961, 31-32.

the United States to the rule of law in hemispheric affairs. The pressure of the Cold War need not cripple our capacity to act as a nation in accord with our traditional fidelity to law. But we must come to understand that the restraints of law often serve our national interest, even when they protect a government as hostile to our welfare as is Castro. The world may not have much time left in which to establish an effective world law. So we must use what time is given to us in a responsible fashion. This is the deepest teaching of the failure of the United States response to the troublesome challenge thrown at us by Castro's Cuba. Perhaps we can learn this from pondering the cry of the impassioned Havana mobs: "Patria o muerte."